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No. 99-703

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MARLIN LEE MILLS,

Petitioner,

v.

JOSEPH P. MEADOWS, ET AL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fourth Circuit properly apply the *Elrod-Branti* analysis to the alleged patronage dismissal of a high ranking Harford County deputy sheriff?

2. Was the *Elrod-Branti* analysis appropriate?

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STATEMENT OF THE CASE

Petitioner, Marlon Lee Mills ("Mills"), appealed from an Order of the District Court of Maryland granting summary judgment to Respondents. The Opinion and Order concluded that Sheriff Joseph P. Meadows ("Meadows") could terminate Mills, a high-ranking deputy sheriff in Harford County, Maryland, on the basis of his political affiliation without violating the First Amendment. Pet. App. A-7 to A-18. The Fourth Circuit Court of Appeals affirmed in an unpublished opinion.[1] Pet. App. A-1 to A-6. The facts developed in the summary judgment record are set forth viewed in the light most favorable to Mills.

In 1971, Robert Coomes (later Sheriff Coomes) hired Mills as an entry level deputy with the Harford County Sheriff's Office. J.A. 7,8. Over the years, Mills was promoted to the rank of deputy first class, corporal, sergeant, lieutenant, and finally captain. Mills received his last two promotions during the administration of Sheriff Coomes, who was elected in 1990. J.A. 61. As a captain in the Coomes administration, Mills was a high ranking official. In a department of 230 deputies, Mills was one of only seven captains and was exceeded in rank by only four individuals, including Sheriff Coomes himself. J.A. 59-60, 64.

In 1994, Sheriff Coomes, a Democrat, ran for reelection against Joseph P. Meadows, a Republican. Pet. 3. At

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[1] Mills named Sheriff Joseph P. Meadows and Harford County as defendants in this action. Harford County bears no liability as the sheriff is an independent state officer and is not an agent or employee of the County. *Rucker v. Harford County, Md.*, 558 A.2d 399, 402, 406 (Md. 1989); *MacMillian v. Monroe County, Ala*, 520 U.S. 781 (1997). Because the County's liability, if any, would have derived solely from Meadows' action in his official capacity, the lower Courts did not confront the County's lack of derivative liability.

the time, Mills was the President of the Harford County Democratic Club. *Id.* Mills actively supported Coomes in the election, displaying Coomes' campaign sign and hosting a fundraiser at the private swim and golf club owned by Mills. J.A. 61-62, 105. Meadows defeated Coomes in the November 1994 general election, becoming the first Republican sheriff in Harford County history. Pet. 2, 3.

In securing victory, Meadows' campaign had pointed to negative incidents and perceptions of mismanagement by the Coomes administration. J.A. 59, 66-69. One major incident involved the death of an inmate. *Id.* Although the death was announced as a suicide, the inmate's family suspected foul play by deputy sheriffs and alleged sodomy and murder. *Id.; See, Zepp v. Rehrmann*, 79 F.3d 381, 383-84 (4th Cir. 1996). The case was settled during the Coomes administration for $400,000.00. *Id.* Although Mills denied any role, as the District Court pointed out, "Meadows could proper[l]y interpret the outcome of the election as a mandate for change, imposing upon him the responsibility to put in place a management team that could effect that change." Pet. App. A-8.

Aside from being the first elected Republican Sheriff in Harford County history, Meadows was a former prosecutor without prior experience as a law enforcement officer. J.A. 60. Thus it was all the more critical that Meadows put in place a management team which he could trust to devise and implement new policies reflective of his campaign promises to the electorate. *Id.* Towards this end, on December 6 and 7, 1994, Meadows met with members of the upper level command staff including Mills. J.A. 60-61.

During the meeting with Mills, Meadows explained that he was unsure of Mills future status in the organization and advised that he would make a decision in the near future. *Id.*

Thereafter, Meadows learned that no member of the upper level command staff wanted to work with Mills, and many lower level deputies "expressed concerns about Mills' police and command acumen." J.A. 61-63. Approximately two weeks after the initial meeting, Meadows informed Mills that he had decided not to reappoint him. J.A. 63, 106. Later that day, Mills took early retirement effective January 1, 1995. J.A. 106.

Mills subsequently filed this action pursuant to 42 U.S.C. §1983, alleging that Meadows terminated him based upon his political affiliation and campaign activities in violation of the First Amendment. Both the District Court of Maryland and the Fourth Circuit Court of Appeals concluded that Meadows was entitled to summary judgment on this issue.

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

The Fourth Circuit correctly applied the precedents of this Court to Meadows' termination of Mills. No conflict exists between the circuits with regard to the alleged political discharge of a high ranking deputy sheriff in Harford County, Maryland in 1994. No prior political affiliation case addressed the dismissal of Harford County deputy sheriffs, much less Mills' particular position. State law and the role of deputy sheriffs vary from state to state. The Fourth Circuit's unpublished decision in this case has very narrow application, not extending beyond the analysis of Mills' position in the Harford County Sheriff's Office. Review of this limited fact pattern, unlikely to be repeated, would lend no guidance to lower courts; particularly where, as here, the case fits squarely within the analytical framework of this Court's prior precedents. This case does not merit the scrutiny of this Court.

1. The Fourth Circuit Properly Applied The *Elrod-Branti* Analysis.

In *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court determined that the dismissal of government employees based upon their political affiliation was unconstitutional, subject to certain exceptions. At the time of these decisions, the tradition in many political subdivisions was to staff public offices with patronage appointments in the wake of elections. *Elrod* and *Branti* limited this practice to certain public offices, thereby curtailing widespread patronage.

In *Elrod*, employees of the Cook County, Illinois Sheriff's Office claimed that a newly elected sheriff violated their First Amendment rights when he laid them off because they were not members of the "proper" political party. By a plurality, the Court found that a "non-policy making, non-confidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod,* 427 U.S. at 375 (Stewart, J. concurring). However, the Court simultaneously carved out an exception permitting patronage dismissals of employees holding "policymaking" positions. *Id.* at 367. The Court remanded the case for consideration of whether any of the discharged employees qualified as policymakers. *Id.* at 368. The rationale for the *Elrod* policymaker exception related to the public need to insure representative government responsive to the electorate.

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by

> tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.

Elrod, 427 U.S. at 367.

In *Branti v. Finkel,* 445 U.S. 520 (1980), the Court revisited the issue of patronage dismissals. Finding that assistant public defenders in Rockland County New York could not be subject to dismissal on the grounds of political affiliation, the *Branti* decision refined the "policymaker" exception described in *Elrod.*

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518.

Branti requires courts to analyze "the public office involved" to determine as a matter of law whether political affiliation is an appropriate requirement for that particular position. The assistant public defenders in *Branti* had "'very

limited, if any, responsibility' with respect to the overall operation of the public defender's office." *Id.* at 511. Therefore, their political affiliation was not an appropriate consideration.[2] *Id.* at 519-20.

Both *Elrod* and *Branti* require that courts inquire on a case by case basis whether political affiliation is an appropriate consideration for the positions in question. *Elrod,* 427 U.S. at 367-68; *Branti,* 445 U.S. at 519. Following these precedents, the Courts of Appeals, including the Fourth Circuit, focus on the position involved to determine whether political loyalty or affiliation are appropriate considerations. *Jimenez Fuentes v. Torres Gaztambide,* 807 F.2d 236, 241-42 (1st Cir. 1986), *cert. denied,* 481 U.S. 1014 (1987); *McEvoy v. Spencer,* 124 F.3d 92, 98 (2nd Cir. 1997); *Burns v. County of Cambria,* 971 F.2d 1015, 1022 (3rd Cir. 1992); *Jenkins v Medford,* 119 F.3d 1156, 163-4 (1997) (*en banc*), *cert. denied* 118 S.Ct. 881 (1998); *Hall v. Tollett,* 128 F.3d 418, 423 (6th Cir. 1997); *Tomczak v. City of Chicago,* 765 F.2d 633, 640 (7th Cir.), *cert. denied,* 474 U.S. 946 (1985); *Fazio v. City of San* Francisco, 125 F.3d 1328, 1332 (9th Cir. 1997); *Dickson v. Quarberg,* 844 F.2d 1435,-1442 (10th Cir. 1988); *Terry v. Cook,* 866 F.2d 373, 378 (11th Cir. 1989).

Neither *Elrod, Branti,* nor prior decisions from any Circuit directly answer the question of whether political affiliation is an appropriate requirement for a high ranking deputy sheriff in Harford County, Maryland. *Elrod* concerned non-law enforcement employees of the Cook County, Illinois Sheriff. *Elrod,* 427 U.S. at 351. Moreover, this Court did not

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[2] "This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty." *Branti,* 445 U.S. at 519, n 13.

decide whether these positions were the type for which political considerations apply, instead remanding the case for consideration of the issue. *Id.* at 368. *Branti* considered a public defender's position in Rockland County, New York and thus also does not directly address the instant case. *Branti,* 445 U.S. at 508.

Nonetheless, the Fourth Circuit applied the *Elrod-Branti* analysis in the instant case by examining Mills' position as a high ranking deputy sheriff in Harford County, Maryland. Pet. App. A-4. Both the District and Circuit Courts below referred to the *Elrod-Branti* analysis conducted by the Fourth Circuit *en banc* in *Jenkins v. Medford,* 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 118 S.Ct. 881 (1998); Pet. App. A-4, A-12.

In *Jenkins,* the Fourth Circuit reviewed the claims of several deputy sheriffs against the newly elected Sheriff of Buncombe County, North Carolina. The deputies, who supported the Sheriff's political opponents during the campaign, alleged that their terminations violated the First Amendment. *See, Id.* at 1158-59.

Applying *Elrod–Branti,* the Court considered "the specific political and social roles of sheriffs and their deputies in North Carolina" and noted that sheriffs in that state are "important political figure[s]" who are responsible for implementing a political agenda that has been approved by the voters through the sheriff's election. *Jenkins,* 119 F.3d at 1163. The Court observed that a North Carolina deputy sheriff is the alter ego of the Sheriff, who can be held liable for a deputy's misconduct. Based upon these considerations, the Fourth Circuit held that party affiliation was an appropriate requirement for the office of a sworn law enforcement deputy sheriff in North Carolina. *Id.* at 1164.

In the present case, the Fourth Circuit noted that Maryland, like North Carolina, considers a deputy sheriff to be the alter ego of the sheriff. *Pet. App.* A-5; *Rucker v. Harford County,* 558 A.2d 399, 402, 406 (Md. 1989). In fact, under Maryland law, the sheriff and his deputy are considered one and the same officer, exercising the same authority and performing the same duties. *Rucker,* 558 A.2d at 406-7. In addition to this substantial autonomy and discretion accorded by law to Maryland deputies, the Fourth Circuit relied upon the fact that Mills was a high ranking official. In a department of two hundred thirty deputies, he was one of only seven captains and exceeded in rank by only four individuals, including the sheriff himself. *Pet. App.* A-5. The Petition ignores this salient and dispositive fact.

Contrary to Mills' assertion in his Petition, the Fourth Circuit has not "provided sheriffs with the unfettered discretion to dismiss deputies from another party." Pet. 13. The Fourth Circuit's unpublished opinion in this case analyzes only a single position, one of the highest ranking positions in a department consisting of 230 deputies. *Pet. App.* A-5. That unique analysis has narrow application and establishes limited precedent. The Fourth Circuit's unpublished opinion in the present case has more narrow implications for deputy sheriffs in Harford County than its prior published decision in *Jenkins* has for deputy sheriffs in North Carolina. Aside from disfavored status as an unpublished opinion,[3] the Fourth Circuit's decision in *Mills* applies only to the highest ranking Harford County deputy sheriffs.

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[3] Fourth Circuit Local Rule 36(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case.

The fact that courts in other jurisdictions have reached "different" results does not warrant review by this Court. The positions examined by courts in patronage dismissal cases vary as widely as the procedural and substantive court records upon which various decisions are based. The responsibilities of deputy sheriffs vary from state to state, and county to county, depending upon state and local law. Deputy sheriffs encompass positions from clerical assistants to civil process servers, jailers, security guards, or sworn law enforcement officers. A deputy's responsibility may range from performing low level ministerial tasks, such as serving civil summons to a high ranking official with substantial discretion and autonomy like Mills.

For example, *Jenkins* applied only to North Carolina deputy sheriffs actually sworn to engage in law enforcement activities on behalf of the sheriff. *Jenkins,* 119 F.3d at 1165. In *Terry v. Cook,* the Eleventh Circuit drew a distinction between the Alabama chief deputy/deputies (the alter ego of the sheriff empowered under Alabama law to enter into business transactions for the sheriff) and clerks, dispatchers, jailers and process servers working for the sheriff, remanding for further consideration whether the responsibilities of the latter positions required political loyalty to the sheriff. *Terry v. Cook,* 866 F.2d 373, 377-378 (11th Cir. 1989). In *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3rd Cir. 1992), the Third Circuit concluded on the basis of the record before the Court that Cambria County deputy sheriffs whose primary duties were serving process, transporting prisoners, and courtroom security did not have significant autonomy or discretion in their jobs demonstrating the relevance of political affiliation. The record before the Sixth Circuit was similarly inadequate to establish that political affiliation was an appropriate requirement for the effective performance of rank and file Cumberland County, Tennessee deputy sheriffs

(noting that the sheriff may be able to establish this proposition affirmatively in future cases). *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir, 1997). However, the Sixth Circuit did find, in the same case, that the Sheriff was entitled to select a chief deputy who shared his political beliefs because the position had a high level of discretion and authority. *Id.* at 425-426.

The record in instant case amply establishes that Mills' position operated with sufficient discretion and autonomy to warrant consideration of his political beliefs by Meadows. As the District Court of Maryland observed:

> As a captain, Mills was a highly placed official in the Coomes administration. Though he denies being a part of Coomes' upper level command staff, the record is clear that only a handful of individuals within the 230 member agency had attained an equal or higher rank. As a result he necessarily served as a link between the sheriff and the deputies in the agency, and played a significant role in the implementation of the sheriff's policies. Thus, Meadows could lawfully terminate Mills for political reasons under the *Elrod-Branti* exception to prohibited political terminations.

Pet. App. A-13.

2. The *Elrod-Branti* Analysis Was Appropriate In This Case.

Mills alleges that he was terminated for supporting and associating politically with Meadows' political opposition. J.A. 10. These are classic allegations of political patronage. The

tests in *Elrod* and *Branti* are specifically designed to deal with such allegations.

However, Mills contends that in addition to the *Elrod-Branti* analysis conducted by the Fourth Circuit, this Court should grant review to determine whether the case should be analyzed under *Pickering v. Board of Education,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 146 (1983).

Pickering involved the dismissal of a high school teacher in Will County, Illinois for openly criticizing the local Board of Education for its handling of revenue raising proposals. *Pickering,* 391 U.S. at 564. *Connick* involved the dismissal of an assistant district attorney in New Orleans, Louisiana for circulating a questionnaire concerning several internal office issues including whether employees felt pressure to work in political campaigns. *Connick,* 461 U.S. 141. Thus, *Connick* and *Pickering* involved free speech claims unrelated to patronage allegations. Neither case involved a patronage dismissal of a high ranking employee in the wake of an election based upon political affiliation or support.

Mills' request that this Court review this case to determine if a *Connick-Pickering* analysis applies is baseless. Mills' complaint alleges a patronage dismissal. Mills has not identified any speech of the type present in *Connick* or *Pickering* in support of his claim.

Mills reliance on *O'Hare Truck Services v. City of Northlake,* 518 U.S. 712 (1996) for his argument that a *Connick-Pickering* analysis should be used in the instant case is misplaced. *O'Hare* dealt with extending patronage protections afforded public employees to independent contractors who refuse to support a candidate and instead

support that candidate's political opposition. *Id.* at 715. This Court did not require that a *Connick-Pickering* analysis be applied in *O'Hare*. Significantly, *O'Hare* was construed as "simply an affiliation case" requiring an *Elrod-Branti* analysis.[4] *O'Hare*, 518 U.S. at 714-715, 720.

Mills, in the instant case, alleges he lost his job because of his political affiliation and support of Meadows' political opponent. Such a claim falls squarely under the *Elrod-Branti* political patronage analysis and not the *Connick Pickering* free speech analysis. There is no need to apply *Connick-Pickering* in this case.

CONCLUSION

For the reasons set forth herein, the Petition for Certiorari should be denied.

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[4] Although construed as a political affiliation case at the motion to dismiss stage, this Court left the lower courts on remand to decide whether the case would be governed by *Elrod-Branti* or *Pickering* at the summary judgment stage. *O'Hare*, 518 U.S. at 726. This tacit acknowledgement that the summary judgment record may support *Connick-Pickering* claims in *O'Hare* does not advance Mills' argument. No speech of the Connick-Pickering variety is evident in the summary judgment record in the instant case.